Supreme Court, U.S.
F I L E D
JUN 18
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No. 85-1033

In the Supreme Court of the United States

October Term, 1985

JOHN J. KELLY,
CONNECTICUT CHIEF STATE'S
ATTORNEY, ET AL.,

Petitioners,

v.

CAROLYN ROBINSON,

Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

BRIEF OF THE RESPONDENT

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QUESTION PRESENTED

Was the United States Court of Appeals for the Second Circuit correct in ruling that the respondent's criminal restitution obligation was discharged in her bankruptcy, under the specific factual circumstances of this case, wherein the state and its agencies, after receiving notice, failed to file a complaint to determine nondischargeability of the obligation under Code § 523(c)?

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CONSTITUTIONAL PROVISION INVOLVED

Article VI, Clause Two, provides:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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STATEMENT OF THE CASE

This case raises the question of whether in a bankrupty proceeding, in which actual notice has been given, the failure by the state and its agencies to file any complaint in the bankruptcy court, pursuant to the requirements of 11 USC § 523(c), requesting a determination of the nondischargeability of a criminal restitution obligation based upon a larcency, will thereby result in that restitution obligation being discharged in bankruptcy.

As stated by the Second Circuit, the material facts in this case are not in dispute.[1] In 1980, the respondent, Carolyn Robinson, was convicted in the Connecticut Superior Court of larcency in the 2nd degree as a result of having wrongfully received $9,932.95 in public assistance

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[1] The following statement of underlying facts is taken in large part from the statement of facts contained in the Second Circuit opinion in the section therein entitled, "Background". See Appendix to Petition (App. to Pet.) at 31A-34A. Appropriate references are made for facts not included in the "Background" section of the Second Circuit's opinion.

benefits from the Connecticut Department of Income Maintenance (CDIM) while at the same time receiving Social Security benefits. On November 14, 1980, she was sentenced to not less than one year nor more than three years in prison, execution suspended and placed on probation for five years. A special condition of her probation, as ordered by the Superior Court, was that she make restitution in the amount of $9,932.95 to be paid at the rate of $100 per month commencing January 16, 1981. J.A. at 21A. Payments were to be made to the Connecticut Office of Adult Probation (COAP). Mrs. Robinson complied with this order through May 4, 1981, and made payments totaling $450.

On February 5, 1981, Mrs. Robinson filed a petition in bankruptcy, under chapter 7, in the U.S. Bankruptcy Court for the District of Connecticut. In her Schedule A-3, she listed among her creditors the State of Connecticut, CDIM, as having a claim for public assistance and the State of Connecticut, COAP, as having a claim for $9,932.95 for restitution. Record, Doc. No. 3. In due course, on February 20, 1981, the bankruptcy court gave notice to both COAP and CDIM that Mrs. Robinson had filed a Chapter 7 bankruptcy petition and that they were listed therein. COAP and CDIM were informed by this notice that April 27, 1981 was the last day for the filing of objections to discharge and for the filing of complaints to determine the dischargeability of any debt pursuant to 11 USC § 523(c).

Although they were each given a total of 66 days to file, together with the opportunity to request additional time under Bankruptcy Rule 4007(c), neither COAP nor CDIM filed any objection to discharge or any complaint to determine the dischargeability of its claim.

On May 14, 1981, the bankruptcy court granted Mrs. Robinson her Discharge in bankruptcy, thereby discharging her from all her dischargeable debts. The Discharge order entered by the court recited than any existing or future judgment obtained in any court other than the bankruptcy court was null and void as a determination of the personal liability of the debtor with respect to any dischargeable debt, and the order enjoined all creditors from commencing, continuing or employing any action or process to collect or recover any such dischargeable debt. J.A. at 13A-14A.

Shortly thereafter, on May 20, 1981, Mrs. Robinson's attorney wrote to COAP stating that Mrs. Robinson's discharge in bankruptcy had discharged the state's restitution order and that Mrs. Robinson no longer had any liability to make further payments to COAP. The letter cited various statutory provisions to support this position, and further stated that in view of this Mrs. Robinson was now being advised by her attorney not to make further payments under the restitution order. The letter concluded with the request to COAP that "If you disagree with the above, please let me know immediately". J.A. at 19A. COAP did not respond to this letter, and Mrs. Robinson stopped making restitution payments at that time.

Nearly three years later, in February 1984, COAP wrote Mrs. Robinson a letter informing her that it considered her restitution order valid and not dischargeable in her bankruptcy and that it intended to enforce the restitution order to the fullest extent possible. The letter requested Mrs. Robinson to resume her monthly payments of $100. The letter acknowledged receipt of Mrs. Robinson's prior payments, totaling $450, and stated that the balance owing was now $9,482.95. J.A. at 21A-22A.

Shortly thereafter, Mrs. Robinson commenced her adversary proceeding in the bankruptcy court against COAP and CDIM seeking a judgment declaring that her Discharge in bankruptcy had discharged her restitution obligation to COAP and CDIM, enjoining the defendants from pursuing their efforts to obtain additional restitution payments, and awarding damages and attorney's fees. By its letter of March 19, 1984, COAP continued in its efforts to collect restitution payments, and requested a $100 payment from Mrs. Robinson by April 1, 1984. J.A. at 23A. In response, Mrs. Robinson made a $100 payment to COAP on April 2, 1984. J.A. at 44A. Mrs. Robinson also moved for preliminary injunctive relief in the bankruptcy court, but that motion was denied on April 3, 1984. J.A. at 41A-42A.

On April 12, 1984, COAP commenced a proceeding in the Connecticut Superior Court based upon Mrs. Robinson's alleged violation of probation. J.A. at 43A-45A. On April 26, 1984, Judge Drutman of the Superior Court entered an Order staying all further proceedings in the state court until there was a final determination made in federal court on the issue of the dischargeability of the restitution obligation. J.A. at 46A-48A.

Following a trial at the bankruptcy court on the merits of the case, the bankruptcy judge entered a Memorandum and Proposed Order, reported at 45 B.R. 423 (Bankr. D. Conn. 1984), denying all of the relief sought by Mrs. Robinson. The court concluded that Mrs. Robinson's restitution obligation was not a "debt" as defined in Code § 101 (11) and that therefore her liability to pay the restitution obligation was not affected by the bankruptcy proceedings. The court further concluded that even if the restitution obligation was a "debt" within the meaning of the Bank-

ruptcy Code, it was nondischargeable under Code § 523(a) (7) as a "penalty". The bankruptcy court relied upon its prior decision in the case of *In re Pellegrino*, 42 B.R. 129 (Bankr. D. Conn. 1984). The bankruptcy court's proposed order was adopted by the district court, and judgment was entered against Mrs. Robinson.

On appeal by Mrs. Robinson, the United States Court of Appeals for the Second Circuit reversed. Its opinion is reported at 776 F.2d 30 (2d Cir. 1985). The Second Circuit ruled that a restitution obligation is a debt as defined by Code § 101(11). The Court analyzed the Code definitions of the terms "debt" and "claim" and concluded that the terms were coextensive and that the definitions were sufficiently broad to include a restitution obligation as to which any person has a right to payment. App. to Pet. at 42A. The Court analyzed the legislative history of these Code provisions and concluded that the Congress sought the "broadest possible definition" of a "claim". App. to Pet. at 37A-42A. The Court further reasoned that the Congress dealt with the issue of monetory obligations arising out of criminal proceedings by making criminal fines, penalties and forfeitures (other than compensation for actual pecuniary loss) nondischargeable under Code § 523(a) (7), and not by excluding such criminal monetory obligations from the scope of the definitions of "debt" and "claim". App. to Pet. at 44A-45A. The Court viewed the Bankruptcy Code as a complex and carefully drawn statute in which obligations arising from the enforcement of criminal laws were carefully dealt with. App. to Pet. at 46A. The Court stated that COAP had a "right to payment", within the definition of the term "claim", because COAP had the right to receive payment from Mrs. Robinson and had the power to seek enforcement of its right. App. to Pet. at 47A.

Finally, the Court having determined that the restitution obligation was a "debt", the Court concluded that it was discharged under the circumstances of this particular case. The Court observed that had COAP or CDIM filed a complaint to determine nondischargeability of this debt pursuant to Code § 523(c) it suspected that the debt would have been excepted from discharge. The Court stated that COAP and CDIM waived their rights under that section by failing to file such a complaint. App. to Pet. at 50A. The Court went on to conclude that the debt was not nondischargeable under Code § 523(a)(7) as a fine, penalty or forfeiture because the debt represented to some extent "compensation for actual pecuniary loss". The Court based its conclusion upon the facts that the restitution obligation was fixed under state law with reference to the loss or damage caused by the offense, that the restitution order was in an amount precisely the same as the amount of public assistance benefits wrongfully received by Mrs. Robinson and that the restitution payments made to COAP are forwarded by it to CDIM. App. to Pet. at 48A-53A.

In a concurring opinion, Judge Mansfield stated that he believed a loophole existed in the Bankruptcy Code whereby a criminal could use bankruptcy to escape the obligation to make criminal restitution payments ordered by a court. He stated that he saw no valid reason for requiring the recipient of criminal restitution payments to file a complaint to determine nondischargeability of the restitution debt under Code § 523(c). He urged Congress to amend Code § 523(a)(7) to make criminal restitution payments nondischargeable in bankruptcy. App. to Pet. at 54A-55A.

SUMMARY OF ARGUMENT

1. Carolyn Robinson's Chapter 7 bankruptcy papers listed among her many creditors in her schedules her debt owing to the State of Connecticut, CDIM, for public assistance and her debt owing to the State of Connecticut, COAP, for "restitution" in the amount of $9,932.25. She was obligated to list all of her creditors in her schedules. The restitution obligation of $9,932.25 was based upon a larceny conviction arising out of the wrongful receipt of public assistance benefits from CDIM in the amount of $9,932.25 at a time when she was also receiving Social Security benefits. Ordinarily a debt based upon a larceny is not dischargeable in bankruptcy, Code § 523(a) (4), but if a creditor fails to file a complaint objecting to the dischargeability of the debt, within the time allowed by the Bankruptcy Court, the debt is discharged. Code § 523(c). The State of Connecticut, CDIM and COAP, were notified of the bankruptcy and of the time for filing complaints objecting to dischargeability; however, no such complaint was filed, and the restitution obligation was, therefore, discharged. Code § 523(c).

2. In an effort to escape the impact of the time bar imposed by § 523(c), the state argues that Mrs. Robinson's criminal restitution obligation is not a debt at all, and therefore is unaffected by bankruptcy, or in the alternative, even if it is a debt it is nondischargeable under an-

other section of the Code, § 523(a) (7), which is not subject to any time bar. Debt is defined in the Code as liability on a claim, and claim is broadly defined as a right to payment, whether equitable, legal, unmatured, contingent or unliquidated. The terms debt and claim are coextensive. The legislative history explicitly states that Congress intended the broadest possible definition to be given these terms so that all legal obligations of the debtor would be dealt with in the bankruptcy case. The Code refers to a fine, penalty or forfeiture as a debt, § 523(a) (7), and larceny as a debt, § 523(a) (4). The Code abolished the entire concept of provability which had limited the definition of debt under the prior Bankruptcy Act. Criminal restitution obligations fit within the extremely broadened definition of debt under the Code and are among the legal obligations to be dealt with in a bankruptcy case.

3. Petitioners' reliance upon cases under the prior Act which held that criminal fines and restitution orders were not debts is misplaced since those cases were generally controlled by the provability concept under the Act, and criminal fines and restitution orders were not provable. Petitioners' claim that there was no right to payment in this case, is incorrect. COAP had a right to receive the restitution payments and the power to seek enforcement of that right. CDIM had the right to receive those payments from COAP and the right to retain them. The State

of Connecticut, listed as creditor, had the most extensive bundle of rights: to prosecute, to collect and retain the payments and to enforce the restitution order.

4. The restitution obligation is not excepted from discharge under Code § 523(a) (7). That section provides for nondischargeability of debts to the extent that they are fines, penalties and forfeitures payable to and for the benefit of a governmental unit and are not compensation for actual pecuniary loss. Mrs. Robinson's restitution order represented compensation to the state and to CDIM for actual pecuniary loss and therefore was not excepted from discharge under § 523(a) (7). The restitution order is authorized under Connecticut law on the basis of the loss or damage caused by the offense; the order was for $9,932.25, the precise amount of the public assistance benefits wrongfully received; and the order was payable for the benefit of the injured party, the state and CDIM.

5. The distinguishing feature about restitution is that the victim is compensated for his pecuniary loss. In a number of jurisdictions, restitution has a definite civil dimension: the restitution order may be transferred to the civil docket and enforced as a civil judgment, the victim may himself enforce the restitution order, and payments made under the order are credited against any judgment the victim may obtain based upon the underlying incident.

In some jurisdictions, restitution has become a method of debt collection. Given the variety of approaches and practices respecting criminal restitution, it is understandable that Congress may not have wanted to make criminal restitution orders nondischargeable *per se*. This is particularly so with respect to state law and state prosecutions, since Congress lacks the power to enact state laws or regulate their enforcement. Congress would be delegating to the states the power to decide dischargeability, and debts which otherwise should be discharged in bankruptcy might be nondischargeable as restitution orders.

6. Any state law which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause. *Perez v. Campbell*, 402 U.S. 637, 652 (1971). Petitioners' effort to pit the doctrine of federalism, enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), against the Supremacy Clause of the United States Constitution must fail. Even if the restitution obligation is not considered a debt, the effort to collect the restitution after the underlying larceny debt has been discharged under § 523(c) violates the Supremacy Clause as articulated in *Perez*. Restitution obligations not otherwise excepted from discharge under § 523(a) are discharged as a result of the policies and priorities established by Congress in the Bankruptcy Code.

ARGUMENT

I. A CRIMINAL RESTITUTION OBLIGATION IS A DEBT

Carolyn Robinson's Chapter 7 bankruptcy papers, filed in the brankruptcy court on February 5, 1981, listed among her many creditors on her Schedule A-3 her debt owing to State of Connecticut, CDIM, for public assistance and her debt owing to State of Connecticut, COAP, for "restitution" in the amount of $9,932.25. (Record, Doc. No. 3). A debtor is obligated to list each of her creditors. Code §521(1); Bankruptcy Rule 1007(a) (1). At that time it was apparent that the restitution obligation might not be dischargeable in her bankruptcy since it was based upon a larceny, and debts based upon larceny are explicitly made nondischargeable in bankruptcy. Code § 523(a)(4). Indeed, an examination of her Schedule A-3 at that time would suggest that a purpose of her filing was to free her from her other debts in order to pay the restitution, rather than to attempt to discharge the restitution obligation, which appeared under § 523(a)(4) to be nondischargeable.

A creditor who claims that a debt is based upon larceny and therefore nondischargeable must file a timely complaint to determine the nondischargeability of the debt. It was only after the state waived its right to object, by allowing the time set by the bankruptcy court for filing such complaints under §523(c) to expire, that it became apparent that the restitution obligation might be discharged. Code § 523(c). To avoid the impact of the time bar imposed by § 523(c), the state argues that Mrs. Robinson's criminal restitution obligation is not a "debt" at all, and therefore is unaffected by bankruptcy, or in the alternative, even if it is a "debt" it is nondischargeable

under another section of the Code § 523(a)(7), which is not subject to any time bar.

A. The Scope Of The Term, "Debt"

The meaning of the term "debt" in the Bankruptcy Code should be examined, since it is "debts" which are discharged in bankruptcy. The Code provides:

> Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . .

11 U.S.C. § 727(b). The Code also provides:

> A discharge in bankruptcy
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> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727 . . .; [and]
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> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any debt as a personal liability of the debtor, . . .

11 U.S.C. § 524(a).

The term "debt" is defined in the Code as "liability on a claim." Code § 101(11). The term "claim" is broadly defined as

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
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> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to

> payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured; . . .

11 U.S.C. § 101(4).

The Bankruptcy Code differs significantly from the prior Bankruptcy Act in that the scope of the terms "debt" and "claim" are deliberately and explicitly expanded. The legislative history of Code § 101(4) states that:

> The effect of the definition is a significant departure from present law. Under present law, "claim" is not defined in straight bankruptcy. Instead it is simply used, along with the concept of provability in Section 63 of the Bankruptcy Act, to limit the kinds of obligations that are payable in a bankruptcy case. The term is defined in the debtor rehabilitation chapters of present law far more broadly. The definition in paragraph (4) adopts an even broader definition of claim than is found in the present debtor rehabilitation chapters . . . By this broadest possible definition, and by the use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

House Report 95-595, 95th Cong. 1st Sess. 309 (1977); Senate Report 95-989, 95th Cong. 2d Sess. 21 (1978); *reprinted in* 1978 U.S. Code Cong. and Ad. News at 6266.[2]

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[2] Under the rehabilitation chapters, "debts" and "claims" were defined to include all claims, debts or demands "of whatever character", whether or not provable as debts. See 11 U.S.C. §§ 506(1) and (6), 707(2) and 1006(1) and (4) (repealed 1979) 1898 Bankruptcy Act §§ 106(1) and (6), 307(2) and 606(1) and (4).

Additional legislative history, indicating that the entire concept of provability of claims was abolisheed under the Code, is set forth in the Second Circuit's opinion in this case. (App. to Pet. at 38A). Abolishing provability greatly enlarged the scope of the term "claim." The legislative history of the definition of "debt" makes clear that, "The terms [debt and claim] are *coextensive*: a creditor has a 'claim' against the debtor; the debtor owes a 'debt' to the creditor." House Report at 310 (emphasis added), *reprinted in* 1978 U.S. Code Cong. and Ad. News at 6267. Clearly, a "debt" is to be construed equally as broadly as a "claim." The Second Circuit has set forth an extensive list of cases which have acknowledged the expanded scope of the definition of "claim", (App. to Pet. at 39A), which in turn indicate the expanded scope of a "debt."[3]

In addition to the broadened definition of debt, the Code refers to a fine, penalty or forfeiture as a "debt". Code § 523(a) (7). This is particularly noteworthy since the precise phrase, "Fines, Penalties And Forfeitures", constitutes the title heading of Chapter 229 in Title 18 of the U.S. Code dealing with crimes and criminal procedure.

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[3] This Court in the case of *Ohio v. Kovacs*, 105 S. Ct. 705, 711 (1985) strongly suggests that a criminal fine or penalty is a "debt" under the Code. In the context of that case, involving a debtor's wrongful violation of Ohio's environmental laws, and in connection with its statement that the debtor's discharge would not protect him from prosecution or from criminal contempt, the Court said ". . . had a fine or monetary penalty for violation of state law been imposed on Kovacs prior to bankruptcy, § 523(a)(7) forecloses any suggestion that his obligation to pay the fine or penalty would be discharged in bankruptcy." The inference to be drawn from this statement is that criminal fines and penalties are included within § 523(a)(7) as debts.

18 U.S.C. Chapt. 229. By using this same language in Code § 523(a)(7) it is evident that criminal monetary obligations were considered within the scope of "debt."[4] Section 523 (a)(7) made these obligations (except for those that were compensation for actual pecuniary loss) nondischargeable; but there would be no need for this provision if these obligations were not considered "debts."

It is also noteworthy that the term, "fine," is new in this context, not having appeared in the prior Bankruptcy Act in the provisions dealing with discharge, provability or allowability; "fine" has a well recognized criminal connotation. The Code also refers to a "debt" for "larceny", § 523(a)(4), another term with a clear criminal connotation. The prior Bankruptcy Act made no reference to larceny in relation to a debt, dischargeable or not. Now a larceny debt is explicitly referred to, and is made nondischargeable, § 523(a)(4), unless the creditor fails to file a complaint to determine nondischargeability, as here. Code § 523(c).

In *In re Brown*, 39 B.R. 820 (Bankr. M.D. Tenn. 1984), the bankruptcy court rejected the claim that a restitution obligation did not represent a "debt." The court's

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[4] Section 726(a)(4) also refers to a fine, penalty and forfeiture as a claim entitled to a distribution of property from the estate. In this section, fine, penalty or forfeiture is set forth as a concept separate from multiple, exemplary or punitive damages, suggesting again the criminal connotation to be given to the term fine, penalty or forfeiture. Under Code § 726(a)(4) fines and penalties are allowed to share in the distribution from the estate. This again is a change from the prior Act which limited allowability only to the amount of pecuniary loss. 11 fines and penalties are included within § 523(a)(7) as debts.

analysis, although a minority view among bankruptcy courts at present, is extremely persuasive, and is set forth in part as follows:

> If the Bankruptcy Code said that only orders to pay money by civil courts are debts for bankruptcy purposes, then credence could be given to the defendant's argument that a criminal court restitution order does not embody a "debt" dischargeable in bankruptcy. However, nothing in the Bankruptcy Code suggests that only civil courts enter orders to pay money that are subject to discharge in bankruptcy. A restitution order by a criminal court no less acknowledges the existence of a debt than an order of a civil court reducing that claim to judgment. The fact that a criminal court might participate in enforcement or collection of the debt between victim and debtor/defendant does not make the underlying obligation a "nondebt" for bankruptcy purposes.
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> To win their argument, the defendants must first characterize the restitution order as being disembodied from the underlying "debt" created by Brown's actions. The defendants must then characterize the restitution order as something other than "debt" for bankruptcy purposes. What then is the restitution order? It acknowledges a "right to payment" yet defendants contend that this particular "right to payment" falls outside the notion of "right to payment" in § 101(4)(A). The restitution order confirms a "liability" of the defendant/debtor yet again, the defendants claim this particular "liability" exists beyond the notion of "liability" in § 101(11). The defendants' argument is nonsense. It requires a level of distortion of language most appropriate for the actions of legislatures and not courts. If the right of payment and the liability in a criminal court order of restitution were intended to be outside of the realm of debt for bankruptcy purposes, then how simple it would have been for Congress to include appropriate language in the Bankruptcy Code.

> The existence of a debt must be determined by substance not metaphysics (citations omitted). A restitution order of a state criminal court—whether it is characterized as embodying the pre-existing debt between the victim and the defendant debtor or if it is characterized as creating a separate obligation—is a "debt" for purposes of the Bankruptcy Code and is dischargeable in bankruptcy if not otherwise excepted from discharge.

39 B.R. at 822-823.

Since Congress intended the broadest possible definition to be given to "claims" and "debts" under the Code, abolished the concept of provability, and used new language with clear criminal connotations in defining nondischargeable debts under § 523(a), it is evident that criminal monetary obligations are included within the ambit of "debt".

B. Cases Under The Prior Bankruptcy Act

The cases under the prior Bankruptcy Act, referred to by petitioners in their brief, dealing with criminal fines and penalties generally stated that such criminal monetary obligations were not dischargeable in bankruptcy because they were not provable.[5] As noted by Collier:

> The Bankruptcy Act made no specific provision concerning the dischargeability of fines and penalties due to a governmental unit, but certain principles became well settled in this respect. Fines for violation of law, and forfeiture were not provable and therefore held to be not dischargeable. Generally, fines and penalties were not affected by discharge.

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[5] The case of *In re Alderson*, 98 F. 588 (D.W. Va. 1899) went the other way; the court held that a criminal fine resulting from a judgment in a state court was a provable debt and was dischargeable in bankruptcy.

3 Collier on Bankruptcy § 523.17 (15th Ed.) (footnotes omitted). The term "debt" itself was defined under the prior Act as ". . . any debt, demand or claim *provable* in bankruptcy" 11 U.S.C. § 1(14) (repealed 1979), 1898 Bankruptcy Act § 1(14) (emphasis added). And the Act specifically provided that only provable debts would be discharged in bankruptcy. 11 U.S.C. § 35a (repealed 1979), 1898 Bankruptcy Act § 17a.

The case of *In re Moore*, 111 F. 145 (W.D. Ky. 1901), holding that a criminal fine did not constitute a debt, contains the following reasoning, ". . . A fine, penalty, or costs imposed on the bankrupt as a penalty is not usually a provable debt. . . . we feel confident that they are not provable. . . . under all former acts they have been considered as not provable. . ." *In re Abramson*, 210 F. 878, 880 (2d Cir. 1914) held that a civil penalty was not provable in bankruptcy. The court stated that ". . . judgments for penalties are not debts which can be proved or allowed. . . ." In *Parker v. United States*, 153 Fed. 66 (1st Cir. 1946) the court held that a civil compensatory fine imposed in a contempt proceeding was a debt provable and dischargeable in bankruptcy. The court observed as to criminal contempt fines, ". . . Being not a provable debt, liability for such a criminal fine is not affected by a discharge in bankruptcy. . . ." The case of *Zwick v. Freeman*, 373 F. 2d 110 (2d Cir.) cert. denied, 389 U.S. 835 (1967), cited by petitioners, apparently does not involve the imposition of any monetary sanctions; the court in stating th t governmental sanctions are not regarded as debts cited the *Parker* and *Moore* cases for that proposition, and, as indicated, those cases consid-

ered a criminal fine not to be a debt because it was not provable. The case of *Spalding v. New York,* 45 U.S. (4 How.) 21 (1846), decided by this Court, contains no opinion explaining the basis of its decision; rather, this Court decided, because of differences among the justices as to the basis for their decisions, to affirm without further opinion the judgment of the New York court holding a criminal contempt fine nondischargeable.

The restitution cases under the prior Bankruptcy Act, referred to by the petitioners, do not change the picture. In *People v. Washburn,* 97 Cal. App. 3d 621, 158 Cal. Rptr. 822, 825 (1979) the court held a restitution obligation nondischargeable, stating the ". . . bankruptcy obviously relates to 'provable debts' (see e.g., 11 U.S.C. § 1 (14)) but that amount ordered to be paid by the municipal court as restitution is not a 'debt' within the meaning of the bankruptcy law." *People ex rel. Auerbach v. Topping Bros.,* 79 Misc. 2d 260, 359 N.Y.S. 2d 985 (Crim. Ct. 1974) does not appear to involve any restitution order whatsoever, and so it is inapplicable.

This review of cases under the prior Bankruptcy Act indicates that criminal fines and penalties, including restitution orders, were generally not considered "debts" because they were not considered provable or allowable. As already indicated, the current Bankruptcy Code has made a major change in these areas. The concept of provability has been abolished. Fines, penalties and forfeitures are now allowed. Code § 726(a)(4). And "claims" and "debts" are to be given the broadest possible definition. Congress has made

its intent clear to change these concepts which existed under the prior Bankruptcy Act. See *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755, 759-760 (1986). Accordingly, the foregoing cases decided under the prior Act are not applicable to the question of whether Mrs. Robinson's restitution order was discharged in her bankruptcy under the Code.

C. The Right To Payment

Petitioners argue that a criminal restitution order cannot be a "debt" or a "claim" because neither the crime victim nor the state court system has a right to payment. The Second Circuit's opinion persuasively demonstates that COAP had a right to payment. App. to Pet. at 46A-48A. Since Congress intended the broadest possible definition for "debt" and "claim", the phrase "right to payment" should be interpreted liberally and broadly consistent with Congressional intent.

Not only does COAP have the right to receive payment from Mrs. Robinson and the power to seek enforcement of that right under Connecticut's statutory scheme, see App. to Pet. at 46A-47A, but the victim also has the right to receive those payments from COAP and the right to retain them. In this case, since both COAP and CDIM are state agencies, and since the State of Connecticut was listed as creditor with respect to both agencies, the situation may also be viewed as one in which the state is prosecuting and collecting for itself, and in which the victim thereby has an even more extensive bundle of rights. See *State v. Duncan*, 438 A.2d 1212, 1214 (App. Sess. 1981) (ruling that the State of Connecticut rather than the agency is the creditor to whom the debt is owing).

Frequently, a creditor under state law may possess a valid claim, but the debtor, due to various federal and state exemption laws, may be judgment proof, and his income and assets may be exempt from the claims of his creditors. Such a creditor may have a right to payment contingent upon there being any available income or assets to be reached, but his right to actually obtain any payment might be non-existent because of federal and state exemption laws. COAP's right to payment was firmly established by the Connecticut Superior Court's order. The court ordered as a special condition of Mrs. Robinson's probation: "Restitution in the amount of $9,932.95 at $100 per month commencing 1-16-81." J.A. at 21A. Any statutory income or property exemptions she might have had were irrelevant with respect to her obligations under the restitution order. It is well recognized that restitution orders, like contempt sanctions, can be a far more effective means of collecting payments than ordinary court judgments. See *In re Brown*, 39 B.R. 820, 824 (Bankr. M.D. Tenn. 1984); *In re Whitaker*, 16 B.R. 917, 922 (Bankr. M.D. Tenn. 1982); *In re Taylor*, 16 B.R. 325, 327 (Bankr. D. Md. 1981); *In re Griffin*, 13 B.R. 591, 592 (Bankr. S.D. Ohio 1981). In view of the extremely broadened definitions of "debt" and "claim" the Second Circuit was correct in its conclusion that Mrs. Robinson's criminal restitution obligation was a "debt" under the Code.

II. THE RESTITUTION OBLIGATION WAS DISCHARGED IN BANKRUPTCY

A. No Objection To The Dischargeability Of The Restitution Obligation Was Filed Under § 523(c)

Mrs. Robinson's restitution obligation was in existence at the time she filed her bankruptcy, and it was listed in her schedules.[6] On February 20, 1981, the bankruptcy court notified both CDIM and COAP of Mrs. Robinson's Chapter 7 petition, and informed each of them that April 27, 1981 was the last day for the filing of objections to discharge and "complaints to determine the dischargeability of any debt pursuant to 11 U.S.C. § 523(c)." J.A. at 10A-12A. Additional time for the filing of such a complaint could have been obtained by either petitioner pursuant to Bankruptcy Rule 4007(c). Neither CDIM nor COAP ever filed any complaint to determine the nondischargeability of the restitution obligation. Accordingly, pursuant to Code § 523(c), the petitioners waived their rights to object to the dischargeability of the restitution obligation, and that debt was, therefore, discharged.[7]

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[6] This fact distinguishes the cases of *United States v. Carson*, 669 F.2d 216 (5th Cir. 1982) and *United States v. Alexander*, 743 F.2d 472 (7th Cir. 1984) which were concerned with criminal restitution orders entered after the debtor had obtained a discharge in bankruptcy, and the cases of *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982) and *In re Davis*, 691 F.2d 176 (3d Cir. 1982) which involved debtors in pending bankruptcy proceedings in which restitution obligations had not yet been entered. This is a significant distinction since a debt must already be in existence at the time of the filing of a bankruptcy petition in order for it to be affected by the bankruptcy discharge. Code § 727(b). See App. to Pet. at 42A-44A.

[7] The bankruptcy court and the district court did agree that the larceny debt was discharged in Mrs. Robinson's bankruptcy pursuant to Code § 523(a). App. to Pet. at 4A.

It is well recognized that a debt which might otherwise be nondischargeable in bankruptcy under § 523(a)(2) (fraud, false pretenses or false representations), § 523(a)(4) (larceny, embezzlement, defalcation or fraud) or § 523(a)(6) (willful and malicious injury) will nevertheless be discharged in the debtor's bankruptcy unless a timely complaint is filed in the bankruptcy court objecting to the dischargeability of that debt. 11 U.S.C. § 523(c); Bankruptcy Rule 4007(c); *In re Gutierrez,* 15 B.R. 268 (N.D. Ill. 1981) (overpayment of $9,453.10 in Social Security benefits, where receipt by debtor was wrongful, held discharged in bankruptcy, and Social Security Administration ordered to refund money subsequently deducted from debtor's benefits); *In re Hawley,* 23 B.R. 236 (Bankr. E.D. Mich. 1982); *In re Rowan,* 15 B.R. 834 (Bankr. N.D. Ohio 1981). Bankruptcy adversary proceedings are not unduly complex or burdensome; the rules of procedure are similar to those applicable in district courts; and collateral estoppel is generally available. See *In re Eadie,* 51 B.R. 890 (Bankr. E.D. Mich. 1985).

B. The Restitution Obligation Was Not Excepted From Discharge Under § 523(a)(7) Since It Represented Compensation For Actual Pecuniary Loss

To escape the impact of Code § 523(c), petitioners argue that the restitution obligation should be considered nondischargeable under § 523(a)(7). Since nondischargeable debts of the § 523(a)(7) variety are not subject to the requirements of § 523(c), the petitioners would not be required to file a complaint in the bankruptcy court objecting to dischargeability, and they would not be subject to a time bar. For a debt to be nondischargeable under § 523(a)(7) it must be a "fine, penalty or forfeiture," and it must meet each of the following three criteria:

1. it must be payable to a governmental unit;
2. it must be payable for the benefit of a governmental unit; and
3. it must not be compensation for actual pecuniary loss.

Since many criminal restitution obligations are payable for the benefit of a private party victim they could never be nondischargable under § 523(a)(7). In the present case, although the restitution obligation is payable for the benefit of a state agency victim, it still does not come within the nondischargeability ambit of § 523(a)(7) because it represents "compensation for actual pecuniary loss."

The exceptions to discharge must be strictly construed in favor of the debtor, to foster comprehensive relief and provide the fresh start which was intended by Congress. See *Perez v. Campbell,* 402 U.S. 637, 648 (1971); *Gleason v. Thaw,* 236 U.S. 558, 562 (1915); *Murphy and Robinson Investment Co. v. Cross,* 666 F.2d 873, 879-880 (5th Cir. 1982); *Houtman v. Mann,* 568 F.2d 651, 656 (9th Cir. 1978); *Household Finance Co. v. Danns,* 558 F.2d 114, 116 (2nd Cir. 1977). The burden of proof lies with the creditor to demonstrate that the particular debt falls within one of the statutory exceptions. *Murphy and Robinson Investment Co.* at 880. The dischargeability of a debt "must be determined by the substance of the liability rather than its form." *In re Spong,* 661 F.2d 6, 9. A court is obliged to look at the plain language of the sections of the Code. "Where, as here, the statutory language clearly expresses the congressional intent, a court may not read another meaning into the statute in order to arrive at a result which the court deems preferable." *In re Flagstaff Food Service Corporation,* 739 F.2d 73, 75 (2d Cir. 1984).

As originally proposed, the exception to dischargeability, now incorporated in § 523(a)(7), was articulated as a "liability to the extent it is for a fine for the benefit of a federal, state, or local government . . ." Report of the Commission on the Bankruptcy Laws, Part II, at 136 (1973). The rationale behind this proposal was stated as follows:

> It is intended to clarify and rationalize the dischargeability status of debts for nonpecuniary loss, i.e., debts for fines, penalties, or forfeitures or for multiple, punitive, or exemplary damages. Under the present Act it has become "well settled" that "fines and penalties are not affected by a discharge." 1A Collier ¶ 17.05, at 1586(1967). Such debts have been regarded as not dischargeable because they are not provable. However, debts owed to governments for fines, penalties, and forfeitures are expressly not allowable under § 57 of the present Act, notwithstanding the general rule that nonprovable debts are not subject to allowance. . . .
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> The proposed Act abandons the concept of "provability," . . . and permits all debts which can be liquidated as of the date of the petition (and certain other debts) to be allowed and discharged unless expressly excepted. The proposed Act does not disallow debts for nonpecuniary losses but subordinates their payment. See §§ 4-403(b), 4-406(a)(3). This clause denies dischargeability only to a fine for the benefit of a governmental unit. All other nonpecuniary debts, including a fine payable to a governmental unit but for the benefit of a private individual, are to be discharged unless they are expressly nondischargeable under another clause of this subdivision, or . . . arise from the same course of conduct as compensatory damages that are nondischargeable.

Report of the Commission on the Bankruptcy Law, Part II, at 141 (1973). The reference to Collier indicates that

criminal fines and penalties were being addressed. The Commission's rationale makes clear that fines representing nonpecuniary loss were to be nondischargeable, and it clearly implies that fines and penalties representing pecuniary loss, such as restitution, were to be discharged unless nondischargeable under another provision; this became more explicit in the current language of § 523(a) (7) with the adoption of the exclusionary clause, "and is not compensation for actual pecuniary loss."

The Second Circuit's analysis and conclusion that the restitution obligation in this case represented compensation for actual pecuniary loss within the meaning of § 523 (a)(7) is correct. See App. to Pet. at 50A-53A. The state court may order restitution for the fruits of the offense or "for the loss or damage caused thereby." Conn. Gen. Stat. § 53a-30(a)(4). The restitution order was for $9,932.-95, the precise amount of money wrongfully received by Mrs. Robinson. J.A. at 21A-22A and 43A-44A. And the restitution payments made by Mrs. Robinson to COAP are subsequently forwarded to CDIM. the victim.

Since restitution performs the clear and distinct function of providing compensation for actual pecuniary loss, it is not nondischargeable under § 523(a)(7). Criminal restitution, in providing compensation to the victim, performs a decidedly civil function, and it is one of those areas of the law where the civil and criminal processes overlap. Because of the significance of the concept of restitution in this case, some further analysis of restitution is appropriate.

C. The Distinguishing Feature Of Restitution Is That The Victim Is Compensated

Contrary to fines and imprisonment, restitution involves compensating the victim of the crime in the sanc-

tioning process. Though restitution may be for punitive and rehabilitative purposes, it invariably and undeniably has compensatory purposes as well. Note, "Victim Restitution In The Criminal Process: A Procedural Analysis," 97 Harv. L. Rev. 931, 936-937 (1984). The distinguishing characteristic of restitution is that the victim is returned her/his loss. Indeed the recent evolution of restitution has been based in large part on a concern that victims are neglected in the criminal process, Victim And Witness Protection Act of 1982, Pub. L. 97-291, § 2(a), 96 Stat. 1248 (1982); Victim And Witness Protection Act of 1982, S. Rep. No. 532, 97th Cong. 10, *reprinted* in 1982 U.S. Code Cong. & Ad. News at 2516 (1982).[8] *See also* R. E. Barnett & J. Hagel III, "Assessing the Criminal: Restitution, Retribution and the Legal Process," in *Assessing the Criminal: Restitution, Retribution and the Legal Process* 1 (R.E. Barnett & J. Hagel III eds. 1977) (volume hereinafter "*Assessing the Criminal*"); R.A. Epstein, "Crime and Tort: Old Wine in Old Bottles," in *Assessing the Criminal* 231; W.F. McDonald, "The Role of the Victim in America," in *Assessing the Criminal* 295. For example, the stated goal of the Victim And Witness Protection Act of 1982 is to "ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime . . .," Pub. L. No. 97-291, § 2(b)(2), 96 Stat. 1248, 1249 (1982). To carry out

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[8] Also of concern was that criminal sanctions are often ineffective. Cf. B. Galaway, "Restitution as an Integrative Punishment," in *Assessing the Criminal: Restitution, Retribution and the Legal Process* 331 (R.E. Barnett & J. Hagel III eds. 1977) volume hereinafter *"Assessing the Criminal"*); R.E. Barnett, "Restitution: A New Paradigm of Criminal Justice," in *Assessing the Criminal* 349; K. Menninger, *The Crime of Punishment* (1968).

this goal, a court may order restitution to the victim or to the victim's estate. As professor Abraham S. Goldstein noted:

> The federal restitution provisions, like others recently enacted in many states, place restitution on its own bottom. They make it plain that a debt to the *victim* is to be repaid in the criminal case, not only a "debt to society." From the perspective of comparative law, it seems that we may be evolving towards a system which resembles the French *partie civile* and the "adhesion" processes known to European systems. These do not divorce the so-called "private" interest of the victim in damages from the "public" interest in the criminal prosecution.

A.S. Goldstein, "A New Role For The Victim? — The Federal Victim Protection Act of 1982", 100 F.R.D. 94, 98 (1983) (emphasis in original).

An important component of the Victim And Witness Protection Act of 1982, *supra* was the addition of a victim impact statement to the presentence report. The presentence report now must contain information concerning any type of harm "including *financial* . . . harm, done to or loss suffered by any victim of the offense," and "any other information that may aid the court in sentencing, including *the restitution needs of any victim* of the offense," Fed. R. Crim. P. 32(c)(2) (emphasis added).

That a major purpose of restitution is to compensate the victim for pecuniary losses has been recognized by many states. Indeed a number of states have declared that it is the policy of the state that the victim be compensated for her/his losses, and thus should be awarded restitution, E.g. Alabama, Ala. Code § 15-18-65 (1985) ("The legisla-

ture hereby finds, declares and determines . . . that all perpetrators of criminal activity or conduct be required to fully compensate all victims of such conduct or activity for any pecuniary loss, damage or injury as a direct or indirect result thereof."); Arkansas, Ark. Stat. Ann. § 43-2350 (1985) ("The General Assembly recognizes that many innocent persons suffer injury, death, property damage and resultant financial hardship as a result of crimes committed in this State, and that there is a genuine need in this State to establish a method whereby the responsible offender, as far as practicable, may be required to make restitution to his victim so as to make that victim whole with respect to the financial injury suffered."); New Mexico, N.M. Stat. Ann. § 31-17-1.A (1985) ("It is the policy of this state that restitution be made by each violator of the Criminal Code of New Mexico to the victims of his criminal activities to the extent that defendant is reasonably able to do so . . . '[R]estitution' means full or partial payment of actual damages to a victim."); South Dakota, S.D. Codified Laws Ann. §§ 23A-28-1 and -2(4) (1985) ("It is the policy of the state that restitution may be made by each violator of the criminal laws to the victims of his criminal activities to the extent that the violator is reasonably able to do so." "'Restitution' means full or partial payment of pecuniary damages to a victim[.]") This civil nature to the restitution order makes it different from other sanctions. In North Carolina,

> [r]estitution and reparation are ancillary remedies to promote rehabilitation of criminal offenders and to provide for compensation to victims of crime, and shall not be construed to be a fine or other punishment as

provided for in the Constitution and laws of this State.

N.C. Gen. Stat. § 15A-1343(d) (1985).

D. Restitution, Under Federal Law Has A Civil Aspect

Because the emphasis is on compensating the victim, restitution orders take on forms different from fines. Notably in the federal system, restitution may be ordered in addition to any other penalty, 18 U.S.C. § 3579(a)(1) (1986). When restitution is for property loss, the amount of the restitution is the value of the property lost, *id.* § 3579 (b)(1)(B). Restitution compensates for losses actually sustained by the victim, such as medical expenses, or lost wages, *id.* § 3579(b)(2). In keeping with the statute's emphasis on the victim, the court must impose an order of restitution "to the extent that such order is as fair as possible to the victim," *id.* § 3579(d). The victim may get restitution only for that part of the loss for which s/he does *not* receive compensation, *id.* § 3579(e)(2). Restitution may be ordered "to any person who compensated the victim for such loss to the extent that such person paid the compensation," *id.* § 3579(e)(1). Restitution is made to the victim, and the victim may individually enforce the restitution order in the same manner as a judgment in a civil action, *id.* § 3579(h). In keeping with the civil nature of the restitution order, any dispute involving the amount or type of restitution is to be resolved by a preponderance of the evidence, and not beyond a reasonable doubt which

is the level of proof required in criminal matters, *id.* § 3580(d). In addition, if an order of restitution is imposed, the defendant is estopped from denying essential allegations of the offense in any subsequent civil proceeding, *id.* § 3580(e).

Because restitution is civil in nature the order of restitution is not necessarily discharged if the defendant dies. In *United States v. Dudley,* 739 F.2d 175 (4th Cir. 1984), the Fourth Circuit found that though purely penal sanctions are extinguished by the defendant's death, a restitution order does not abate and may be charged to the defendant's estate. The court stated:

> It does not require great perspicacity to appreciate the substantial difference between *restitution* to the person victimized by the crime . . . and *forfeiture,* collectible only by the avenging United States government bent on punishing an offender.
>
> Hence we are not impressed by purely verbal logic. "A crime is a crime is a crime" simply does not serve to resolve the dispositive issue.

Dudley, 739 F.2d at 177 (emphasis supplied by court). The court found that since restitution's predominant purpose is to be compensatory, and is to be enforced in the same manner as any other civil judgment, the obligation to make restitution does not abate with the defendant's death. *Id.* at 177-178.

E. Restitution Under Various State Laws Has A Civil Aspect

Because restitution has a civil nature to it, many states treat restitution like civil monetary judgments. In some states the restitution order is transferred to the

civil docket and may be enforced as any civil judgment. E.g., Delaware, Del. Code Ann. tit. 11, § 4101(b) (1984) ("If [an order to pay a fine, costs, or restitution is] not paid promptly upon its imposition or in accordance with the terms of the order of the court, the clerk or Prothonotary shall cause the judgment to be entered upon the civil judgment docket of the court whence it may be executed and enforced or transferred in the same manner as other judgments of the court; provided, however, that where a stay of execution is otherwise permitted by law such a stay shall not be granted as a matter of right but only within the discretion of the court."); Minnesota, Minn. Stat. Ann. § 611A.04 Subd. 3 (West 1986) ("An order of restitution shall be docketed as a civil judgment by the clerk of the district court in the county in which order of restitution was entered."); Utah, Utah Code Ann. § 77-18-1(9) (1985) ("The prosecutor shall provide notice of the restitution order to the clerk of the court. The clerk shall place the order on the civil docket and shall provide notice of the order to the parties. The order shall be treated as a legal judgment under which the victim may seek civil remedy."); New York, N.Y. Crim. Proc. Law § 420.10.6 (Consol. 1986) ("The court's order [of fine, restitution or reparation] also shall direct the district attorney to file a certified copy of such order with the county clerk . . . Such order shall be entered by the county clerk in the same manner as a judgment in a civil action.

A number of states specifically allow the victim to enforce a restitution order.[9] E.g., Alabama, Ala. Code

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[9] In New Mexico, the victim "may request, and the court shall grant a hearing on any matter related to the plan of restitution[,]" N.M. Stat. Ann. § 31-17-1.F (1985).

§ 15-18-78(a) (1985) ("A restitution order in a criminal case shall be a final judgment and have all the force and effect of a final judgment in a civil action under the laws of the state of Alabama. The victim on whose behalf restitution is ordered the executor or administrator of the victim's estate, or anyone else acting on behalf of the victim shall be entitled to all the rights and remedies to which a plaintiff would be entitled in a civil action under the laws of this state as well as any other right or remedy pertaining to such restitution order as may be provided by law."); Florida, Fla. Stat. Ann. § 775.089(5) (West 1985) ("An order of restitution may be enforced by the state, or a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action."); Georgia, Ga. Code Ann. § 17-14-13(b) (1985) ("If an offender willfully refuses to comply with a restitution order, the order, in the discretion of the court may be enforced by attachment for contempt, upon the application of the prosecuting attorney or the victim."); Idaho, Idaho Code § 19-5305 (1985) ("After forty-two (42) days from the entry of the order of restitution or at the conclusion of a hearing to reconsider an order of restitution, whichever occurs later, an order of restitution may be recorded as a judgment and the victim may execute as provided by law for civil judgments."); Minnesota, Minn. Stat. Ann. § 611A.04 Subd. 3 (West 1986) ("An order of restitution may be enforced by any person named in the order to receive the restitution in the same manner as a judgment in a civil action."); Missouri, Mo. Ann. Stat. § 546.640 (Vernon 1986) ("The party injured shall have a lien on the estate of the criminal from the time of his arrest, subject to any lien granted by law to the state."); South Dakota,

S.D. Codified Laws Ann. §23A-28-1 (1985) ("An order of restitution may be enforced by the state or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action."); Utah, Utah Code Ann. § 77-18-1(9) (1985) ("The prosecutor shall provide notice of the restitution order to the clerk of the court. The clerk shall place the order on the civil docket and shall provide notice of the order to the parties. The order shall be treated as a legal judgment under which the victim may seek civil judgments.")

Though restitution orders do not bar the victim from suing the defendant for damages sustained as a result of the defendant's activities, the damages received by the victim in the civil suit typically must be offset by the restitution already received. E.g. Alabama, Ala. Code § 15-18-75 (1985) (". . . the court shall credit any restitution paid by the defendant to a victim against any judgment in favor of the victim in [a] civil action."); Delaware, Del. Code Ann. tit. 11, § 4106(e) (1984) ("A civil verdict shall be reduced by the amount of restitution paid under the criminal restitution order."); Florida, Fla. Stat. Ann. § 775.089(8) (West 1985) (". . . the amount of such restitution shall be set off against any subsequent independent civil action."); Georgia, Ga. Code Ann. § 17-14-11 (1985) (". . . any payments made by an offender to a victim under an order for restitution may be a set off against any judgment awarded to the victim in a civil action based on the same facts for which restitution was ordered."); Indiana, Ind. Code Ann. § 35-50-5-3(b) (Burns 1985) ("An order of restitution under subsection (a) does not bar a civil action for *other* damages suffered by the victim.") (Emphasis added); Iowa, Iowa Code Ann. § 910.8 (West

1985) (". . . any restitution payment by the offender to the victim shall be set off against any judgment in favor of the victim in a civil action arising out of the same facts or event."); Kentucky, Ky. Rev. Stat. § 533.030(3) (g) (1985) ("A civil verdict shall be reduced by the amount paid under the criminal restitution order."); Maine, Me. Rev. Stat. Ann. tit. 17-A, § 1327 (1985) ("Any restitution ordered and paid shall be deducted from the amount of any judgment awarded in a civil action brought by the victim against the offender based on the same facts. If the restitution ordered and made was work restitution, the reasonable value of the services may be deducted from any such judgment."); Maryland, Md. Ann. Code art. 27, § 640(f) (1985) ("A civil verdict shall be reduced by the amount paid under the criminal restitution order."); Minnesota, Minn. Stat. Ann. § 611A.04 Subd. 3 (West 1986) ("The offender shall be given credit, in any order for judgment in favor of a victim in a civil action, for any restitution paid to the victim for the same injuries for which the judgment is awarded."); Mississippi, Miss. Code Ann. § 99-37-17(1) (1985) (". . . the court shall credit any restitution paid by the defendant to a victim against any judgment in favor of the victim in [a] civil action."); Montana, Mont. Code Ann. § 46-18-249(3) (1985) ("Any restitution paid by the offender to the victim must be set off against any pecuniary loss awarded to the victim in a civil action arising out of the facts or events which were the

basis for the restitution."); New Mexico, N.M. Stat. Ann. § 31-17-1.H (1985) (". . . any restitution payment by the defendant shall be set off against any judgment in favor of the victim in a civil action arising out of the same facts or events."); North Carolina, N.C. Gen. Stat. § 15A-1343(d) (1985) (". . . any amount paid by the defendant under the terms of an order as provided herein [a restitution order] shall be credited against any judgment rendered against the defendant in [a] civil action."); Oregon, Or. Rev. Stat. § 137.109(1) (1985) (". . . the court shall credit any restitution paid by the defendant to a victim against any judgment in favor of the victim in [a] civil action."); Utah, Utah Code Ann. § 3-201.2(1) (1985) (". . . the court shall credit any restitution paid by the defendant to a victim against any judgment in favor of the victim in [a] civil action."); Wisconsin, Wis. Stat. Ann. § 773.09(7) (West 1985) ("Any restitution paid by the probationer to the victim shall be set off against any judgment in favor of the victim in a civil action arising out of the facts or events which were the basis for the restitution."); Wyoming, Wyo. Stat. § 7-13-314(a) (". . . any restitution payment by the defendant to a victim shall be set off against any judgment in favor of the victim in a civil action arising out of the same facts or events.").

F. Restitution Clearly Has A Compensatory Aspect To It Since In Some States, Criminal Restitution Has Become One Method Of Debt Collection

Debt collectors have used the criminal process to collect debts, especially when dealing with bad check prosecutions. See D. Rendleman, *The Bankruptcy Discharge: Toward A Fresher Start,* 58 N.C.L. Rev. 723, 736. Many states require mandatory restitution if the debtor is convicted of passing bad checks, e.g. Washington, Wash. Rev. Code Ann. § 9A.56.060(5) (1986) ("Unlawful issuance of a bank check in an amount of two hundred fifty dollars or less is a gross misdemeanor and shall be punished as follows: (a) The court shall order the defendant to make full restitution; . . ."). Creditors will often force the debtor to make payment on the bad check by either threatening or carrying through a criminal prosecution. A Tennessee court has noted:

> It is a matter of common knowledge that creditors in Tennessee frequently resort to the threat of a criminal prosecution to compel the payment of a civil debt. In many, if not most instances, criminal prosecutions brought under the bad check and similar statutes are ultimately resolved by the criminal charges being withdrawn in return for the payment of restitution and costs by the defendant. This is so engrained in the criminal system of this state that the creditor Martin referred to his practice of dealing with bad checks as "turn[ing] them into the Sessions Court *for collection.*"

In re Whitaker, 16 B.R. 917, 922 (Bankr. M.D. Tenn. 1982) (emphasis in original). Another court noted:

> *It is quite clear that the vast majority of merchants and others who receive worthless checks regard law enforcement officers and the courts as mere agencies to collect their money.* . . . This attitude prevails in other states where surveys show *a significant number* . . . [of merchants] *rely upon* . . . [worthless (sic) statutes] *rather than upon a civil remedy* . . . .

In re Barnett, 15 B.R. 504, 507 (Bankr. Kan. 1981) (citations omitted; emphasis in original); See also *In re Brown*, 39 B.R. 820, 824 (Bankr. M.D. Tenn. 1984) ("Creditors use (and abuse) state criminal process as a technique for collection of debt"). This form of debt collection has not been limited to bad checks. Courts have recognized that the criminal process was being used to collect civil debts in the case of homeowners who attempted to collect from a bankrupt contractor, *Matter of Van Riper*, 25 B.R. 972 (Bankr. W.D. Wis. 1982) (Homeowners could not take steps to collect debt from bankrupt contractor by using criminal process without first seeeking relief from automatic stay, therefore, mortgage note and foreclosure held void, and homeowner creditor and his attorney found in contempt.), and in the case of criminal nonsupport, *In re Kaping*, 13 B.R. 621 (Bankr. Ore. 1981) (State of Oregon enjoined from prosecuting debtor for criminal nonsupport when reason for prosecution was to collect support payments discharged in bankruptcy.).

A number of Bankruptcy Courts have enjoined criminal prosecution against the debtor because they found that the reason for the prosecution was to collect on a debt.[10]

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[10] See *In re Goree*, 46 B.R. 697 (D.C.W.D. Ky. 1984). *In re Curley*, 25 B.R. 59 (Bankr. S.D. Ohio 1982); *In re Alan I.W. Frank*

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The creditor would try to collect by getting criminal restitution. In the bankruptcy context, the question frequently addressed was whether a creditor was trying to use the criminal process to gain an advantage over other creditors similarly situated, and frustrate the purposes of the Bankruptcy Code. If so, the prosecution should be enjoined. Cf. *In re Lake,* 11 B.R. 202 (Bankr. S.D. Ohio 1981) (Court permanently enjoined criminal proceedings instituted by collection agency, its clients and their agents, when instituted solely to collect bad check debt.).

Considering the wide variety of approaches to criminal restitution existing in various jurisdictions, the distinct civil aspect of criminal restitution in many instances, the involvement of the victim in determining the amount of the order and in enforcing that order, and especially considering the abuse that has been revealed in the use of the criminal process to collect civil debts, it is understandable that Congress may not have wanted to make criminal restitution orders nondischargeable *per se.* Particularly is this so with respect to state law and state prosecutions, since the Congress lacks the power to enact state laws or regulate their enforcement. Congress would be delegating to the states

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Corp., 19 B.R. 41 (Bankr. E.D. Pa. 1982); *In re Strassman,* 18 B.R. 346 (Bankr. E.D. Pa. 1982); *In re Whitaker,* 16 B.R. 917 (Bankr. M.D. Tenn. 1982); *In re Kaping,* 13 B.R. 621 (Bankr. D. Or. 1981); *In re Bray,* 12 B.R. 359 (Bankr. M.S. Ala. 1981); *In re Lake,* 11 B.R. 202 (Bankr. S.D. Ohio 1981); *In re Reid,* 9 B.R. 830 (Bankr. M.D. Ala. 1981); *In re Caldwell,* 5 B.R. 740 (Bankr. W.D. Va. 1980); *In re Barth,* 4 B.R. 141 (Bankr. W.D. Mo. 1980).

Cases in which criminal prosecutions were enjoined under the former Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978), include: *In re Penny,* 414 F. Supp. 1113 (W.D.N.C. 1976); *In re Burke,* Bankr. L. Rep. (CCH) ¶ 66,368 at 76,200 (E.D. Tenn. Oct. 22, 1976); *In re Hassinger, Inc.,* 20 B.R. 517 (Bankr. E.D. Pa. 1982).

the power to decide dischargeability on the basis of what any particular state allowed or labelled as a criminal restitution order. By allowing all state criminal restitution orders to be nondischargeable *per se* Congress would be creating a "loophole" in the bankruptcy laws, allowing creditors to collect on claims that might well be discharged in bankruptcy. Claims for bounced checks, "larceny", running a stop sign and operating a motor vehicle without insurance could be used to urge prosecution and obtain restitution orders for debts or auto accidents which would ordinarily be discharged. See *In re Brown*, 39 B.R. 820, 824 (Bankr. M.D. Tenn. 1984); see also *In re Cornell*, 44 B.R. 528 (Bankr. Conn. 1985)[11] (conviction of operating a motor vehicle without insurance resulted in a criminal restitution order for the amount of damage done to the other person's car).

G. The Effect Of The Supremacy Clause

Mrs. Robinson's restitution obligation was in existence prior to the filing of her bankruptcy. Accordingly, if her restitution obligation does not fall within one of the exceptions to discharge under § 523(a), and is determined to be discharged under §§ 727(b) and 524(a), the state's efforts to enforce and collect the order must cease pursuant to mandate of the Supremacy Clause, U.S. Constitution, Article VI, Clause 2.[12] Nor may the state seek to revoke Mrs. Robinson's probation solely for not paying a debt dis-

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[11] The *Cornell* ruling was ordered modified by the U.S. District Court in light of the Second Circuit's decision in this case; an appeal was then taken to the Second Circuit and was voluntarily dismissed without prejudice to renewal within thirty days of the final decision by this Court in this case.

[12] Even if the restitution obligation is considered not to be a "debt" under Code § 101(11), the enforcement of the restitu-

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charged in bankruptcy. See Code § 525. See also *Perez v. Campbell*, 402 U.S. 637, 652 (1971) ("any state law which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause").

The petitioners urge that the principles of comity and federalism set forth in *Younger v. Harris*, 401 U.S. 37 (1971) should lead to a determination that criminal restitution obligations cannot be discharged in bankruptcy. The *Younger* doctrine does not relate to the issue of the dischargeability of debts in bankruptcy. Debts owing to states and debts resulting from state court judgments are clearly dischargeable in bankruptcy. See Code §§ 524(a) and 525(a). The *Younger* doctrine involves the issue of abstention by a federal court from enjoining a state court proceeding. However, in the present case the state court ordered a stay of the state criminal proceedings pending a final determination of the bankruptcy dischargeability question by the federal court. J.A. at 46A-48A. Accordingly, the *Younger* doctrine does not apply to this case.

Petitioners also argue that if § 523(a)(7) does not apply to criminal restitution obligations there may be occasions in the future when certain criminal restitution obligations would fall outside the scope of the various nondischargeable debt categories listed under § 523(a) and would, therefore, be discharged in bankruptcy. Of course, this

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tion order against Mrs. Robinson after the underlying larceny debt has been discharged impacts upon the Supremacy Clause. A state law may not conflict with or interfere with the accomplishment and execution of the full purposes and objectives of Congress under the Bankruptcy Code. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See also, *In re Davis*, 691 F.2d 176, 178 (3d Cir. 1982) wherein the court, although abstaining from exercising jurisdiction, noted that a restitution order regarding a discharged debt may raise serious questions under the Supremacy Clause.

argument does not apply to the present case since the present restitution obligation would have been nondischargeable under either § 523(a)(2) or § 523(a)(4) if petitioners had filed a complaint in the bankruptcy court. Petitioners cite at p. 30 of their brief nine examples of restitution orders that would not otherwise be discharged, such as restitution arising from the crimes of reckless manslaughter, criminally negligent homicide, reckless assault with a deadly weapon, reckless burning, bribery, receiving kickbacks, cruelty to animals and professional gambling. Depending upon the underlying facts in these cases, these restitution claims may well be nondischargeable as arising from false pretenses, false representations, fraud, defalcation, embezzlement, larceny or willful and malicious injury by the debtor to the person or property of another. See Code §§ 523(a)(2), (4) and (6). See also *Spilman v. Harley*, 656 F.2d 244 (6th Cir. 1981) (creditor was entitled in bankruptcy court to attempt to prove willful and malicious injuries caused by debtor's conduct, even though state court judgment did not find willful and wanton misconduct, provided elements of willful and wanton misconduct were not necessary to the state court action).

To the extent that there are a few restitution orders that are ultimately dischargeable in bankruptcy it simply means that the policies and priorities established by Congress through the Bankruptcy Code shall prevail; this results from the impact of the Supremacy Clause. See *Perez v. Campbell*, 402 U.S. 637, 649-652 (1971). One illustration of this point is provided by the fact situation presented in the case of *In re Cornell*, 44 B.R. 528 (Bankr. Conn. 1985). There, the debtor, after being involved in a motor vehicle accident, was convicted of operating a motor vehicle without insurance and ordered to pay restitution

to the other party for the damage to their automobile. The bankruptcy judge ruled that the restitution order for damage to the motor vehicle was not discharged because criminal restitution is not a debt, and if it were, it is excepted from discharge under § 523(a)(7). This kind of claim arising from property damage to an automobile clearly would be discharged in bankruptcy but for the special status given to it by the bankruptcy judge as a criminal restitution order.

The fact situation in *Cornell* is strikingly similar to the fact situation in the *Perez* case.[13] By using a criminal restitution order a state may circumvent the impact of the *Perez* holding and the impact of the Bankruptcy Code discharge provisions. The Supremacy Clause is not that fragile It is the effect of the state law upon the full effectiveness of the federal law that is controlling, and not the labels or procedures that the state may employ. As this Court noted: "As early as *Gibbons v. Ogden,* 9 Wheat.1 (1824), Chief Justice Marshall stated the governing principle — that 'acts of the State Legislatures . . . [which] *interfere with,* or are contrary to the Laws of Congress, made in pursuance of the constitution', are invalid under the Supremacy Clause." *Perez v. Campbell,* 402 U.S. 637, 649 (1971) (emphasis in original).

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[13] In *Perez,* the debtor, while operating a motor vehicle without insurance, had been involved in an accident, and a judgment had been entered against him for injuries and damage sustained in the accident. Although the judgment was discharged in bankruptcy, the state, under its motor vehicle safety responsibility law, continued to suspend the debtor's license and registration until the judgment was paid in full. This Court held the state law constitutionally invalid as violative of the Supremacy Clause. *Perez v. Campbell,* 402 U.S. 637 (1971).

CONCLUSION

For the foregoing reasons and for the reasons stated in the Second Circuit's opinion, this Court should uphold the judgment and decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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